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Against Instantaneous Democracy

Ming-Sung Kuo*

<Abstract>

In this article, I aim to shed new light on the state of populism by looking beyond the substance of recent populist movements to examine their form. I argue that new populism, which is characterized by instantaneousness and simultaneity made possible by social media and other communications technologies, betrays a pathology of instantaneous democracy in its pursuit of unmediated politics at the expense of democratic representation and deliberation. To show how new populism poses a fundamental challenge to constitutional democracy, I first bring the unnoticed double structure of articulated politics at the heart of constitutional democracy to the fore: the structural articulation of distinct stages of decisionmaking in the multistage process of constitutional governance and that of formal constitutionalized powers and unformed public opinions. As the double structural articulation assumes a temporal gap, first, between each stage of formal decisionmaking, and, second, between opinion-formation and policymaking, I then discuss how this assumed temporal gap is being virtually obliterated amidst the wave of new populism, shaking the structure of articulated politics to its foundations. In response, I suggest that democratic learning, aided by tactics of judicial deceleration before the figuring out of a grand strategy, is critical in combating new populism.

Keywords: instantaneous democracy, articulated politics, double structure of articulation, new populism, authenticity, unmediated politics, judicial deceleration, political representation, democratic learning, epistemic democracy, separation of powers, judicial review, social media, public opinion

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1. INTRODUCTION

“Populism talks” come and go. Since it first appeared in the nineteenth-century Russia, the world has seen waves of populism.¹ Subsumed under the fashionable label “new populism,” the political tides foregrounded by the Brexit referendum, Donald Trump’s election victory, and the surge of radical parties from Greece to Poland heralded the latest round of populism talk.² To fight back against the tide of populist sentiments, it has been argued that the right mix of sensible policies and institutional responses is required, including constitutional safeguards against populist attempts to perpetuate political domination through anticonstitutionalist constitutional entrenchment.³ Defending democratic institutions with better constitutional design has been the shared conviction of generations of public lawyers at least since Weimar Germany.⁴ Through this lens, there is nothing new about the latest surge of populism except that it is the most recent arrival in the ebb and flow of right-wing populist

¹ PIERRE ROSANVALLON, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST 265 (Arthur Goldhammer trans., 2008); JAN-WERNER MÜLLER, WHAT IS POPULISM? 18 (2016).

² Notably, left-wing populist movements in Latin America had been underway before the current populism talk came to the fore. MÜLLER, *supra* note 1.

³ See, e.g., David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 118-37 (2018). In his recent book, Pierre Rosanvallon attributes the structural cause of populism to what he calls the “presidentialization-personalization” of the executive power in constitutional democracies. PIERRE ROSANVALLON, GOOD GOVERNMENT: DEMOCRACY BEYOND ELECTIONS 11-15, 45-113, 215-19 (Malcolm DeBevoise trans., 2018).

⁴ See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 127-29 (1997).

tides.⁵

That is not the lens through which I read new populism in this article. Looking beyond the substance of populist movements to examine their form,⁶ I aim to show a new development in populism by drawing out its characteristic features shared by some of recent populist movements. As I shall further discuss, the new development is characterized by its simultaneous politics driven by social media and other instantaneous communications technologies,⁷ posing a novel challenge to constitutional democracy other than the exclusionary form of identity politics and the anticonstitutionalist institutional entrenchment as shown in traditional populist movements.⁸ Betraying the pathology of instantaneous democracy, *new populism* is new because it not only throws what William Scheuerman calls “social acceleration”⁹ into sharp relief but also brings the question of what I call the “structural articulation” in constitutional democracy into the limelight.

Specifically, I aim to achieve two goals through examining new populism. The first is to bring the double structural articulation in constitutional democracy to the fore. As I shall argue, constitutional democracy is premised on the structure of articulated politics in the sense

⁵ With the recent examples of populism in mind, Jan-Werner Müller defines populism as an antielitist, antipluralist movement of exclusionary identity politics. MÜLLER, *supra* note 1, at 2-4.

⁶ For a substance-oriented observation of recent populist movements, see MÜLLER, *supra* note 1.

⁷ Jeffrey A. Gottfried et al., *The Changing Nature of Political Debate Consumption: Social Media, Multitasking, and Knowledge Acquisition*, 34 POL. COMM. 177 (2017).

⁸ Notably, the feature of exclusionary identity politics tends to make populism inseparable from right-wing political movements as it more often than not demonizes immigrants, racial minorities, and other marginalized groups as alien intruders. Yet, as Müller rightly points out, left-wing populism also evokes exclusionary identity politics, though the focus is on class. *See id.* at 31-34, 73-74. Centering on the substantive feature of exclusionary identity politics, however, Müller’s critique of recent populist movements merges into those that are directed against totalitarian ideologies.

⁹ WILLIAM SCHEUERMAN, LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME 9-23 (2004). *See also* HIGH-SPEED SOCIETY: SOCIAL ACCELERATION, POWER, AND MODERNITY (Hartmut Rosa & William E. Scheuerman eds., 2008).

that first, constitutional decisionmaking is a multistage process with individual stages articulated to each other. The second structure of articulated politics exists between the formal constitutionalized powers and the people's unformed public opinions. Unformed opinions are that into which formal powers tap for political replenishment so much so that both are articulated to each other and integral to constitutional democracy. My second goal is to shed light on how structural articulation works and why new populism as the pathology of instantaneous democracy poses a fundamental challenge to constitutional democracy. I shall argue that both structures of articulation work on the assumption that there exists a temporal gap and distinction, first, between each stage of formal decisionmaking, and, second, between the incubation of opinions and the formation of policies. Yet, that assumed temporal gap and distinction is being virtually obliterated amidst the wave of new populism. With democracy becoming instantaneous at the expense of democratic representation and deliberation, the structure of articulated politics is shaken to its core. To counter new populism, I draw on the idea of democratic learning, suggesting a response underpinned by "judicial deceleration."

To probe the profound challenges new populism poses to the double structure of articulated politics,¹⁰ I first provide a diagnosis of the move towards instantaneous democracy as embodied in new populism in Section 2. Following the discussion of the premised structure of articulated politics in constitutional democracy and the impact of instantaneous

¹⁰ For a discussion of how instantaneousness and simultaneity driven by social acceleration affects the temporal assumption of liberal democracy, see SCHEUERMAN, *supra* note 9. Besides, time has been studied as an institution and a resource in governance scholarship. See Michael Howlett & Klaus H. Goetz, *Introduction: Time, Temporality and Timescapes in Administration and Policy*, 80 INT'L REV. ADMIN. SCI. 477 (2014). See also Klaus H. Goetz, *Time and Power in the European Commission*, 80 INT'L REV. ADMIN. SCI. 577 (2014); Klaus H. Goetz & Jan-Hinrik Meyer-Sahling, *Political Time in the EU: Dimensions, Perspectives, Theories*, 16 J. EUR. PUB. POL'Y. 180 (2009).

democracy on it in Section 3, I further explore how the idea of “deceleration” can shed light on responsive strategies to mitigate the effect of instantaneousness in Section 4. By decelerating instantaneous democracy through the judicial proceedings, I argue, the learning function of democracy can be revitalized and given a role in the battle against new populism.

2. A (FOOL’S) DEMOCRATIC DREAM COME TRUE: AUTHENTICITY, INSTANTANEOUSNESS, AND NEW POPULISM

From Juan and Eva Peron’s appeal to class-transcendent masses to European radical parties’ disdain for the Brussels expertocracy, all the populist movements, past and present, tap into antiestablishment sentiments.¹¹ It is not only true on both sides of the Atlantic. Recep Tayyip Erdogan’s dethroning of the Kemalists in Turkey and Rodrigo Duterte’s sneering at the human rights values established by the 1986 Filipino People Power also appeal to the popular distrust of established institutions and conventional opinion leaders. Yet antiestablishment passion alone does not bring about the political phenomenon of populism. Underneath the widely shared antiestablishment feelings is broad dissatisfaction with the status quo of democracy.¹² When the government fails to deliver what the people have hoped for, they naturally seek change. What differentiates populist sentiments from the periodic disappointment at the performance of democratically elected governments is that the people turn to populist political movements when they are not only discontent with the policy results of democratic institutions but also feel disenchanting with the institutions themselves.¹³

¹¹ MÜLLER, *supra* note 1, at 1; Robert R. Barr, Populists, *Outsiders and Anti-Establishment Politics*, 15 PARTY POL. 29, 31 (2009).

¹² See also Barr, *supra* note 11, at 32.

¹³ *Id.*

Nevertheless, blaming the unhappy life condition on democratic institutions does not give the full picture of populism. For example, antidemocratic forces such as ambitious coup plotters in the military and enthusiasts of revolutionary politics of movement parties may make pitches to those who have been devastated by a lost war, for example, and therefore lost faith in democracy. In those cases, elections are cancelled and democracy is displaced by military dictatorship or revolutionary one-party rule. Dictatorship poses an existential threat to democracy for sure and the latter may degenerate into the former if we are banal about democratic institutions but it is hard to mistake one for the other.¹⁴

Juxtaposed against the conspicuousness of antidemocratic forces such as military coup plotters or one-party rule revolutionaries, the semblance of democracy makes populism deceptively enchanting. For this reason, the challenge populism poses towards constitutional democracy is subtle and even more fundamental.¹⁵ Like coup plotters or revolutionaries, populists do blame democratic institutions for a lost war, a miserable economy, or other difficulties in daily lives. In contrast to those antidemocratic forces, however, populist movements fall short of challenging the core institution of democracy, i.e., election, existentially, at least when they are emerging from crowds.¹⁶ Rather, they attack the institutional players in electoral democracy such as political parties, mass media, and other mediating institutions in democracies for their intermediary role in the formation of the general

¹⁴ See Mike Alvarez et al., *Classifying Political Regimes*, 31 *STUD. COMP. INT'L DEV.* 3, 4 (1996).

¹⁵ Cf. Paul Taggart, *Populism and the Pathology of Representative Politics*, in *DEMOCRACIES AND THE POPULIST CHALLENGE* 62, 79 (Yves Mény & Yves Surel eds., 2002).

¹⁶ Jules Coleman & John Ferejohn, *Democracy and Social Choice*, 97 *ETHICS* 6, 14 (1986). This point also suggests that it would be hasty to assume that all branches of constitutional power become equally authoritarian once a populist politician is elected. That assumption obscures the subtlety of how populist politics works.

will, if you will.¹⁷ These democratic intermediaries filter out the authentic choices from the people, turning democracy into the instrumentality of the privileged sectors of society, allege populists. If election is a necessary condition for democracy as Robert Dahl contended,¹⁸ populist movements noticeably blame democratic institutions but fall short of assaulting democracy in the way dictatorship or totalitarianism does.¹⁹

The foregoing discussion shows that populism appeals to antiestablishment feeling and attributes the miserable policy results of an elected government to its democratic institutions without rejecting the core institution of election in a constitutional democracy. Why then do parties and other mediating institutions become the target in the populist reaction to the status quo of democracy? The answer needs to be understood through the populist prism: Mediating institutions are the root cause of democracy's failure to give voice to the authentic opinions of the people. At first sight, that looks no different from a restatement of the classical principal-agent question in political representation.²⁰ Yet what sets populism apart from other responses to the agency problem in democracy is its appeal to authenticity.²¹ To see this point, let us take a closer look at what representation looks like in the eyes of populists.²²

As far as political representation is concerned, a populist politician does not claim to better represent the people in the sense that he interprets what the people say and think more

¹⁷ Taggart, *supra* note 15, at 71-75.

¹⁸ ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 128-32 (1956).

¹⁹ Müller discusses how populists rationalize their "failure" to win elections but falls short of explaining why populists choose to participate in the electoral mechanism in the first place. See MÜLLER, *supra* note 1, at 27, 29-30, 66-69.

²⁰ See HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 47-48, 109-10, 121-25 (1972).

²¹ Ben Stanley, *The Thin Ideology of Populism*, 13 J. POL. IDEOLOGIES 95, 104 (2008). See also MÜLLER, *supra* note 1.

²² ROSANVALLON, *supra* note 1, at 267; Taggart, *supra* note 15, at 71-75.

faithfully and renders it in wiser policy choices. Rather, he professes to *re-present* (or rather “instantiate”) the authentic will of the people through his acts and moreover his character when the people are persuaded to identify themselves in the populist movement rallying around himself.²³ On this view, existing parties are not representative at all but part of the problem instead. In the place of those incorrigible political parties is not just another new party with an alternative platform to which constituents would subscribe. What replaces the old parties is the character-defined political movement in which his followers can identify themselves.²⁴ In terms of Hannah Pitkin’s typology of political representation, a populist politician represents the people by “standing for” vis-à-vis “acting for” them.²⁵

By virtue of authenticity, populism dissolves the agency problem. Yet, to make the authenticity appeal work, a populist politician will have to find a direct link between himself and the people.²⁶ Through such a link, the populist politician is able to present his personal traits as the evidence of authenticity so much so that the people will be led to find themselves in the character of the populist leader and thus believe that he is their messenger.²⁷ Noticeably, appealing to authenticity does not mean that what a populist politician says means little to his targeted audience. On the contrary, what he tells determines whether the populist passion will bring about a successful populist movement or just more empty populism talks. To succeed, what a populist politician says needs to fit into the genre of political narratives,

²³ See PITKIN, *supra* note 24, at 241-42; PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 193-95 (1997). Cf. PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 187-202 (Arthur Goldhammer trans., 2011).

²⁴ Seen in this light, Macron and his *La République En Marche!* are a phenomenon of populism, too. But cf. MÜLLER, *supra* note 1, at 36-37, 42-43.

²⁵ See PITKIN, *supra* note 20, at 60-111.

²⁶ MÜLLER, *supra* note 1, at 35-36.

²⁷ This evokes the idea of “representation as a mirror.” See ROSANVALLON, *supra* note 3, at 218.

i.e., a story about his personal character.²⁸ This politically constructed character needs to be both unique and familiar. It needs to be unique because only the populist leader is supposed to have the right balance of the various traits in his character.²⁹ At the same time, his character cannot be unfamiliar. The politically constructed character will fail to evoke resonance from the populist politician's followers if they are unable to see a bit of themselves reflected in at least one of his character traits.³⁰ Thus, the key to the populist political representation lies in the "descriptive" correspondence between a populist leader and the followers.³¹ Through the prism of the leader's politically constructed character, political ideas, policy proposals, and reform plans are read. Ideas, proposals, and plans all fade into his character traits as depicted in his personal story.³²

Seen through the lens of authenticity, deliberation becomes the excuse for hesitation on decision or aversion of responsibility; free democratic representation turns out to be the grand scheme of screening out unwanted opinions; civilities reflected in the political protocols appear

²⁸ This is why political biographies become a fad in election campaigns. See also Rosa van Santen & Liesbet van Zoonen, *The Personal in Political Television Biographies*, 33 BIOGRAPHY 46 (2011).

²⁹ Müller fails to see the possibility of "right balance" when he vaguely notes the "charismatic," "extraordinary gifts" of Hugo Chávez. MÜLLER, *supra* note 1, at 32-33.

³⁰ See also Duncan McDonnell, *Populist Leaders and Coterie Charisma*, 64 POL. STUD. 719, 723-24 (2016). Seen in this light, populism is not necessarily tied to political charisma, which is mysterious in nature. See generally Takis S. Pappas, *Are Populist Leaders "Charismatic"? The Evidence from Europe*, 23 CONSTELLATIONS 378 (2016).

³¹ Pitkin points out two forms of representation by "standing for:" descriptive and symbolic. See PITKIN, *supra* note 20, at 60-111. Notably, speaking of "the fascist theory of representation," she argues that it was an instance of symbolic representation. *Id.* at 107-11. See also MÜLLER, *supra* note 1, at 27-29.

³² Cf. ROSANVALLON, *supra* note 23, at 199-200. Race, language, and ethnicity are the most visible markers of political identity and populists tend to align themselves with nationalists, nativists, or even racists. CARL SCHMITT, *CONSTITUTIONAL THEORY* 247-48 (Jeffrey Seitzer trans., 2008). Yet populism does not necessarily build on racism, nationalism, or other culture-based nativist ideas to be exclusionary. Class is one alternative. Another is personality, which is antipluralist by definition. New populism shares aversion to diversity and pluralism with other populist movements. See *supra* note 8. Cf. IVAN KRASDEV, *AFTER EUROPE* (2017).

as hypocrisy. All of them are despised as signs of inauthenticity. Both deliberative and representative democracy are seen as the forms of political diversion and thus the failure of authenticity. From the populist perspective, making policies on the basis of authenticity unburdened by deliberation or reflection is the ultimate form of politics based on identity, the eternal democratic dream worth pursuing.³³

I hasten to add that appealing to authenticity is not what is new about the latest round of populism talk. Rather, populist movements have long spoken the language of political identity, longing for authenticity.³⁴ Yet, as noted above, to appeal to authenticity, a direct link must be found between the populist leader and the targeted audience.³⁵ Needless to say, like all politicians, populists need means of communications and usually speak through a medium. In other words, apart from tapping skillfully into the rich cultural register of representation embedded in political history as discussed above, populism needs to find new means of direct communications to offer itself as a new politics centering on authenticity when political establishments are perceived to fail to act for the people.³⁶

In the old days, populists had relied on pamphleteering or editorializing to make their views known. Later on, they turned to the radio and TV broadcasting to make appeals to the

³³ Compare ROSANVALLON, *supra* note 23, at 187-88, with SCHMITT, *supra* note 32, at 239-49. See also ROSANVALLON, *supra* note 1, at 267.

³⁴ Francisco Panizza, *Introduction: Populism and the Mirror of Democracy*, in POPULISM AND THE MIRROR OF DEMOCRACY 1 (Francisco Panizza ed., 2005).

³⁵ See MÜLLER, *supra* note 1, at 35-36.

³⁶ From a historico-sociological perspective, populism can be examined as the complex process of the institutional change of constitutional democracy. See Peter L. Lindseth, *Between the 'Real' and the 'Right': Explorations along the Institutional-Constitutional Frontier*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 60, 62-74 (Maurice Adams et al. eds., 2017). I am indebted to Peter Lindseth for this insightful observation.

people. Of course, they also made appearances in mass political rallies from time to time. Yet, at most times, the politicians who appealed to authenticity only found their messages mediated through some medium. After making their authenticity appeals, populist politicians had to wait and rely on the media to spread the word. In the meantime, political dynamics did not stop for the word to spread out and some unexpected events might intervene. This temporal gap has been the structural constraint on appeals to authenticity.³⁷ Situated in the mediated form of politics, the populist leader lacked full control over the means to make the people identify themselves with him. Deficiencies of direct links set the populist leader and the people apart. This explains why populism talks abounded in history but only a few ended up as successful political movements and why blood and genes were central to the antipluralist construction of identity in past waves of populism.

Yet, with the coming of the age of social media, the wait ends and the intermediary media become dispensable.³⁸ Now politicians find the missing direct link with the people through the Internet. In the real world, they may be distant and disconnected from each other. In the virtual space, however, politicians and the people can bond together by a simple finger touch thanks to the advance of communications technologies. Moreover, it is no accident that in contrast to the conventional wisdom that the charismatic populist leader stands as the authentic symbol of the People's assumed moral impeccability,³⁹ a modicum of vulgarity

³⁷ This suggests a fourth dimension of political time that exists alongside the dimensions of polity, politics, and policy as proffered by Goetz and Meyer-Sahling. Goetz and Meyer-Sahling, *supra* note 10, at 184-91.

³⁸ See David Ingram & Asaf Bar-Tura, *The Public Sphere as Site of Emancipation and Enlightenment: A Discourse Theoretic Critique of Digital Communication*, in *RE-IMAGINING PUBLIC SPACE: THE FRANKFURT SCHOOL IN THE 21ST CENTURY* 69 (Diana Boros & James M. Glass eds., 2014). See also CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (2017).

³⁹ Compare MÜLLER, *supra* note 1, at 27-29, with Pappas, *supra* note 30.

usually comes with a new populist movement. With the pervasive simultaneity of political communications, politics has been more or less demystified and become transparent.⁴⁰ As a result, current populist movements in established democracies seem to benefit more from their successes in popular resonance than from their appeals to the mysterious character of political charisma.⁴¹ Viewed thus, authenticity is not necessarily attached to political messianism in new populism, while blood and genes are no longer the predominant vectors of identity politics throughout current populist movements.⁴² In other words, vulgarity is not always anathema to a new populist movement but can rather be presented as the evidence of the authenticity of its populist leader. In the shared, not so sophisticated, but unfiltered daily character traits the populist leader and his targeted people seem to find each other. The former is not just a symbol of the latter's political identity. Rather, both are descriptive of each other.⁴³ This is the current form in which new populists stand for the people.

To be clear, not all politicians are turning themselves into populists, not to mention right-wing demagogues, in the age of social media.⁴⁴ Nor do I suggest that vulgarity is what defines new populism. Nevertheless, the political landscape pervaded by social media is layered with the soil for the flowering of populism in which showmanship appears to characterize new populist politicians better than charisma does.⁴⁵ It is also worth noting that the direct link

⁴⁰ Cf. STEFAN HERBRECHTER, POSTHUMANISM: A CRITICAL ANALYSIS 179-94 (2013).

⁴¹ Cf. Pappas, *supra* note 30.

⁴² Rodrigo Duterte's "penal populism" in the Philippines is one example. Nicole Curato, *Politics of Anxiety, Politics of Hope: Penal Populism and Duterte's Rise to Power*, 35 J. CURRENT SOUTHEAST ASIAN AFF., no. 3, 2016, at 91, 94.

⁴³ For further discussion of "descriptive representation," see Pitkin, *supra* note 24, at 60-91.

⁴⁴ Barack Obama once contested the meaning of populism, contending that he represented "real" populism. See David Von Drehle, *Barack Obama Reveals His Populist Blind Spot*, TIME, Jun. 30, 2016, <http://time.com/4389939/barack-obama-donald-trump-populism/>.

⁴⁵ Compare McDonnell, *supra* note 30 with John B. Judis, *Us v. Them: The Birth of Populism*, THE

between politicians and the people being made possible by social media and other communications gadgets is not a one-way traffic. Not only do politicians appeal to the people directly but the people also press politicians and communicate among themselves unaided by traditional media. From out of this reconfigured relationship between the politicians and the people, we see emerging new populist leaders who appeal by standing for the people in the descriptive sense as noted above instead of standing above the people as the political symbol of moral integrity as seen in traditional populist movements. Moreover, the link between politicians and the people becomes one of not only directness but also immediacy thanks to the innovation of social media. Taken together, the age of social media redefines political temporality by accelerating the tempo of democratic processes, heralding the arrival of instantaneous democracy.⁴⁶

The democracy of instantaneousness brings about a new political landscape. On the one hand, it releases the untapped political energy in democratic societies, suggesting a more responsive and unmediated form of politics. On the other hand, instantaneousness unleashes the spell of authenticity.⁴⁷ In the eyes of populists, this appears to be a democratic dream come true.⁴⁸ The feature of instantaneousness breathes new life to populism. New populism points in the direction of unmediated politics.

3. THE QUESTION OF STRUCTURAL ARTICULATION: GOVERNANCE UNDER INSTANTANEOUS DEMOCRACY

GUARDIAN, Oct. 13, 2016, <https://www.theguardian.com/politics/2016/oct/13/birth-of-populism-donald-trump>.

⁴⁶ See also SCHEUERMAN, *supra* note 9.

⁴⁷ See *id.* at 195-217.

⁴⁸ Cf. ROSANVALLON, *supra* note 23, at 123-27, 132, 134.

Though instantaneousness is what accounts for the newness in the current wave of populist movements as it suggests the immediacy of communication and brings fresh impetus to the populist pursuit of authenticity, the central questions of new populism as a political phenomenon remain unanswered. In what way and to what extent does the instantaneousness of new populism impact on constitutional democracy? Is unmediated politics a problem at all? To assess the state of democratic institutions in the shadow of instantaneous democracy, we need to take a step back to look at the structure of constitutional governance more closely.⁴⁹

3.1. The Double Structure of Articulation

One of the major achievements of modern constitutionalism is to tame political power through a constitutional framework. To cut the long story short, in the face of the autonomous political power unleashed by the progress from premodern feudalism to modern sovereignty, modern constitutions emerged as the solution to the issues arising from the dominant role of the government in steering social relations.⁵⁰ Modern constitutionalism aims to maintain the state's political autonomy without reducing the energetic civil society to the government's subsidiary.⁵¹ To this end, the political power is framed within a "constitutional form."⁵²

⁴⁹ It is worth noting that Scheuerman has looked into the implications of instantaneousness and simultaneity to liberal democracy before the rise of social media. Situated in the pre-social media era, he pinned hopes for more responsive politics on the regulation of the commercialization and monopoly of mass media without considering the prospect of unmediated politics resulting from the prevalence of social media. SCHEUERMAN, *supra* note 9, at 202-09. Though I agree with his diagnosis of social acceleration, my present focus is on the pathological consequences when populists ride the wave of speedier social acceleration in the age of social media.

⁵⁰ See DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE 6-15 (2016).

⁵¹ See *id.* at 27-28, 63-64; ERNST-WOLFGANG BÖCKENFÖRDE, STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW 26-46 (J.A. Underwood trans., 1991); N.W. BARBER, THE CONSTITUTIONAL STATE 17-33 (2010).

⁵² See Martin Loughlin & Neil Walker, *Introduction*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 1, 1-3 (Martin Loughlin & Neil Walker eds., 2007).

The scope of government power is thus delimited to allow for the free space of civil society in the refounding of the political power on the constitutional ground.⁵³ Paralleling the framing of the political power, citizens are expected to become part of the collective authorship of the laws that steer their lives through the representative government organization under the modern constitutional project.⁵⁴ For this reason, the exercise of government power is divided among three (or more) separate governmental departments, which jointly work towards the realization of political self-determination.⁵⁵

Read in this light, the constitutional design of separation of powers appears to be centering on the division of government power, with an eye to preventing the emergence of the unlimited and uncontrollable state. The division (or separation) of powers into the three branches (or stages) of administration, legislation, and adjudication is thus associated with the idea of limited government.⁵⁶ Jeremy Waldron finds such explanations unsatisfactory or incomplete.⁵⁷ Instead, he seeks to redefine separation of powers as a constitutional design of “articulated governance” and to explain its structure through the lens of how political power is channeled into constitutional governance.⁵⁸ In this light, the constitutional design of separation of powers will turn out to pivot on a structure of articulation, not separation.

To start with, as the tripartite separation of powers suggests, constitutional governance

⁵³ See ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 2-4, 52-53 (Deborah Lucas Schneider trans., 1995).

⁵⁴ See GRIMM, *supra* note 50, at 27-32. See also Paul W Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115 (2014).

⁵⁵ See CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS 51-109 (2013).

⁵⁶ E.g., CARL JOACHIM FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON (1974).

⁵⁷ JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTION 49-54 (2016).

⁵⁸ *Id.* at 45, 62-70.

comprises the legislative, administrative, and judicial exercise of power.⁵⁹ Further along this line of thinking, Waldron looks beneath its surface and perceptively observes that the exercise of power under the tripartite separation of powers can be further divided into ten stages or so.⁶⁰ Specifically, to turn an idea into reality, the people must be able to envisage the desired political action (I), formulate the action plan as a policy in a legislative bill (II), and enact the policy into law through the legislative processes of deliberation and voting (III). Following its enactment, the law needs to be made known to the public so that the people can take the change resulting from the new legislation into consideration and adjust their life plans accordingly (IV). In the meantime, the law needs to be communicated to the administration, too, as it has to develop strategies for enforcement (V). Furthermore, disputes are expected to arise when the administrative agencies actually implement the enforcement strategies (VI). Though the agencies may take initial decisions as to how to respond in such cases (VII), disputes are likely to end up in the court. The court has to adjudicate on disputes after a series of hearings (VIII & IX). Yet this is not the end of the multistage process of constitutional governance. After the court makes the ruling, to put the initial idea into action requires one more stage in the exercise of political power: compliance (X).⁶¹ Taken as a whole, constitutional governance is a function of the foregoing constitutionally ordered multistage exercise of political power through which ideas can be turned into policies and laws are put into action.

⁵⁹ See MÖLLERS, *supra* note 55. Scheuerman schematically ties the institutional separation of administration, legislature, and courts to a separation of temporalities into the present, the future, and the past. See SCHEUERMAN, *supra* note 9, at 27-68.

⁶⁰ It should be noted that Waldron is ambivalent about how each stage is exactly defined and demarcated from others. See WALDRON, *supra* note 57, at 64.

⁶¹ *Id.* at 63-64.

Waldron's in-depth analysis not only illuminates the constitutional channeling of political power through a multistage process under the tripartite separation of powers. Moreover, it reveals the structural relationship between individual decisionmaking stages, which lies at the heart of constitutional governance. I have noted that the objective of constitutional governance is to turn political visions and ideas into reality through the constitutionally ordered exercise of power. Though an idea or a vision needs to be translated into norms in the first place through legislation, administrative acts, or judicial rulings, it needs to be acted out by the people in their daily lives in the final analysis. Thus, apart from norm translation, the peaceful and smooth compliance of the idea-turned norms is essential to constitutional governance. And, the peaceful and smooth compliance of new norms depends largely on whether they fit into the people's life plans through a reflective process of norm internalization, so to speak.⁶² To this end, each stage in the multistage decisionmaking process is distinctive in contributing to the "incorporation of new norms into the lives and agency of those who are to be subject to them."⁶³ That is the function of democratic learning embedded in the multistage process of constitutional governance.⁶⁴ On this view, each stage exists in its own right but is articulated to others at the same time as it paves the way for the next. An idea does not turn into reality until it goes through the distinct but articulated stages of constitutional decisionmaking.⁶⁵ The articulation of the multiple stages of decisionmaking within the constitutional design of

⁶² See also GRIMM, *supra* note 50, at 346.

⁶³ WALDRON, *supra* note 57, at 64.

⁶⁴ Compare PREUSS, *supra* note 53, at 116-26, with ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY 11 (2016).

⁶⁵ Not all norm implementations result from administrative enforcement or judicial adjudication. The people may simply act in accordance with new norms.

separation of powers is the first underlying structural articulation of constitutional governance.

To allow the people to internalize the norms through the multistage process, each stage must last for a certain period of time instead of existing only at a fleeting moment, suggesting that a temporal gap and distinction exists between individual stages. This is why Waldron contends that apart from the reflective internalization of the norms, the multistage process also allows the norms themselves to “‘settle in’ and become a basis” on which both the people and the government agencies plan their next step in the political life in the face of new norms.⁶⁶ The constitutional design of separation of powers works on the assumption that democratic decisions are taken over a period of time, not at a transient moment.⁶⁷ Only at this “stepwise” and deliberative tempo can individual stages of the multistage process be articulated to each other, thereby new norms being incorporated into the lives and agency of those who are to be subject to them. And, it is in this way that the “stepwise” realization of power in the constitutional structure of articulated governance “embodies the concerns about liberty, dignity, and respect that the rule of law represents.”⁶⁸ Viewed thus, separation of powers is not only about the constitutional ordering of political power. It is the institutional kernel of constitutional democracy.

As suggested above, one of the stages in the extended process of constitutional governance is to communicate the idea-turned norms to the people so that they can adjust their life plans accordingly. Notably, such communication is anything but unilateral propaganda.

⁶⁶ WALDRON, *supra* note 57, at 63-64.

⁶⁷ Social acceleration itself puts a structural strain on the multistage process of constitutional governance. *See also* SCHEUERMAN, *supra* note 9, at 44-60.

⁶⁸ WALDRON, *supra* note 57, at 64.

Its success pivots on whether the norms can be effectively incorporated into the people's daily lives and their agency through reflective self-internalization. The people are not merely the passive receivers of the legal precepts in the project of constitutional governance. Moreover, the post-enactment communication is not the only stage in which the people play a political role in constitutional governance. I am not alluding to election. What I have in mind is the people's input to the envisaging and planning of a political action and their interaction with the institutional players through the multistage process. The people's multifaceted intervention in the constitutional decisionmaking process is an integral part of constitutional governance.⁶⁹ Seen in this light, constitutional democracy stands as a political project aimed at striking a right balance of democratic legitimacy and distrust of power.⁷⁰

As Pierre Rosanvallon notes, historically the people became "politicized" beyond bestowing democratic legitimacy on the governing authorities. Early precedents included the "tribunal of ephors,"⁷¹ the residual right to resistance,⁷² and the Athenian political trials.⁷³ They did not completely disappear from the modern constitutional project. Instead, maintaining distrust of democratically legitimated power, which underlay those historical examples, has found its way into the modern constitutional design through the institutions such as independent auditing,⁷⁴ opposition party,⁷⁵ and recall election.⁷⁶ All of them work on the

⁶⁹ See GRIMM, *supra* note 50, at 27, 63.

⁷⁰ See ROSANVALLON, *supra* note 23, at 137-53. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981).

⁷¹ See ROSANVALLON, *supra* note 1, at 91-92, 131-33.

⁷² See *id.* at 125-31.

⁷³ See *id.* at 195-202.

⁷⁴ See *id.* at 73-74.

⁷⁵ See *id.* at 156-60.

⁷⁶ See *id.* at 207-13.

principle of democratic distrust, which keeps vigilance about democracy,⁷⁷ holds onto a variety of veto powers on democratic decisions,⁷⁸ and reserves the final judgment to the people themselves.⁷⁹ More important, the people's intervention does not necessarily take place through formal institutions.⁸⁰ Rather, under the same principle of democratic distrust, the people can be politically active through their unformed opinions. That explains why "public opinion" has been variably associated with the concepts of "civic vigilance,"⁸¹ "critical sovereignty,"⁸² and the people's "judgment" in political theory.⁸³ Those variations on the role of the public opinion in democratic societies are evocative of the people's unformed intervention in the multistage process of constitutional governance as a counterbalance to the democratically elected government.

Thus, the people's multifaceted intervention, often in the name of the (unformed) public opinion, which Rosanvallon calls "counter-democracy" (vis-à-vis electoral democracy centering on the formal powers in constitutional governance),⁸⁴ is critical to constitutional democracy. The term "*counter-democracy*" may be misleading but is suggestive of the relationship between the formal powers and the people's unformed public opinions in

⁷⁷ See *id.* at 33-75.

⁷⁸ See *id.* at 179-86.

⁷⁹ See *id.* at 191-93, 214-47.

⁸⁰ Drawing on Nicolas de Condorcet's historical construct of popular sovereignty, Rosanvallon observes of plural temporalities in constitutional democracy: the short term, the periodic, and the long term. Institutionally, the parliament and the constitutional court embody the periodic and the long-term democracy, respectively. Along these lines, he regards the constitutional court as an institution of reflexivity in constitutional democracy. See ROSANVALLON, *supra* note 23, at 128-33, 140-47. The short-term democracy is mainly a function of the people's intervention, which can be reflexive, too, though it is sometimes institutionalized as referendum or censure. See *id.* at 128, 148.

⁸¹ ROSANVALLON, *supra* note 1, at 39.

⁸² *Id.* at 169.

⁸³ *Id.* at 201.

⁸⁴ See *id.* at 12-18.

constitutional democracy. It is noteworthy that the people's political intervention through unformed public opinions is not “*anti-democratic*” as it is not antagonistic towards the formal constitutional powers.⁸⁵ For this reason, public opinions are neither a depoliticized expression of personal views nor an antipolitical performance of collective cynicism. Rather, the formal powers and the people's unformed public opinions are effectively the twin pillars of governance under constitutional democracy. Though they are distinct and rub against each other from time to time, they are structurally articulated to ensure the functioning of constitutional democracy.⁸⁶ Alongside the articulation of the multiple stages of decisionmaking within the formal constitutional framing of powers, the dynamic and sometimes contentious interaction between the formal powers and the people's unformed public opinions constitutes the second underlying structural articulation of constitutional governance.

3.2. *After Articulated Governance*

I have noted that the structural articulation in the multistage process of constitutional decisionmaking works on a stepwise and deliberative political tempo as democratic decisions are taken over a period of time. This assumption applies to the second structural articulation, too. To understand why the articulated relationship between the formal powers and the people's unformed public opinions assumes a deliberative tempo, let us first examine the current condition of the people's unformed political intervention instead.

⁸⁵ See Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745 (1999).

⁸⁶ See ROSANVALLON, *supra* note 1, at 3-8. See also ROSANVALLON, *supra* note 3, at 265. Cf. GRIMM, *supra* note 50, at 47-48.

As discussed above, distrust underlies the people's intervention through unformed public opinions, with an eye to maintaining the balance between democratic legitimacy and distrust of power. Thus, regardless of whether public opinions shape up as civic *vigilance*, *critical* sovereignty, or the people's *judgment*, intervention is supervisory rather than initiatory. To put it differently, the people's intervention acts like an exercise of the "negative sovereignty" of veto power, which dovetails the employment of "positive sovereignty" through the democratic decisions of formal powers.⁸⁷ As Rosanvallon observes, the articulated relationship between negative and positive sovereignty is not always frictionless.⁸⁸ If public oversight, critical sovereignty, and the people's judgment are detached from the end of "protect[ing] the proper functioning of existing organs of government [from corruption]"⁸⁹ and become ends in themselves, the balance between people's unformed public opinions and the formal institutions of constitutional democracy would be broken. Vigilant oversight and public criticism would no longer be the expression of increasing citizen activism but rather become the rejectionists' means of institution heckling and wrath venting,⁹⁰ while judgment, or rather, judgmental citizenship, would only serve to avoid making decisions and dodging responsibility instead of enhancing the political responsibility of decisionmaking.⁹¹ As a whole, the people's unformed public opinions would turn into disruptive forces for the formal institutions of constitutional governance. In that scenario, the government may be more exposed and appear more "visible" but less "legible" with incessant online polling emerging

⁸⁷ See ROSANVALLON, *supra* note 1, at 121-22, 159-60, 302-04.

⁸⁸ See *id.* at 299-303.

⁸⁹ ROSANVALLON, *supra* note 3, at 265.

⁹⁰ See ROSANVALLON, *supra* note 1, at 186-190.

⁹¹ See *id.* at 271-72.

as the new fashion of opinion formation.⁹² As a result, the people's unformed public opinions would no longer be that into which the formal powers could tap for political replenishment but instead become "unpolitical," if not antipolitical.⁹³ Not much to anyone's surprise, that scenario is not imaginary. It is the current condition of counter-democracy as diagnosed by Rosanvallon.⁹⁴

It is beyond the scope of the present article to pinpoint the causes of the mutation of counter-democracy or as I call it, the people's unformed public opinions. Yet it is obvious that empowered by new communications media, the people are now able to intervene in the positive exercise of political power at any stage in the multistage process of constitutional governance immediately to such an extent that the line is becoming blurred between the formal powers and the unformed public opinions, the two sides of constitutional democracy.⁹⁵ Institutional decision and public reaction are taking place virtually synchronously. "[I]mprisoned in the immediate,"⁹⁶ the current interaction between the formal powers and the people's unformed opinions suggests an instantaneous decisionmaking style, displacing the stepwise and deliberative political tempo that is critical to norm translation and internalization in constitutional governance. The distinction between the incubation of opinions and the

⁹² See ROSANVALLON, *supra* note 3, at 157-59, 184-85, 201-02.

⁹³ See ROSANVALLON, *supra* note 1, at 253-64, 283-89.

⁹⁴ "Populism radicalizes the three forms of counter-democracy [, namely,] the democracy of oversight, negative sovereignty, and politics as judgment." *Id.* at 267-68. In his recent book on good government, Rosanvallon noticeably shifts emphasis from the principle of distrust underpinning his concept of "counter-democracy" to how civic groups can contribute to the reconstruction of trust in democracy. See ROSANVALLON, *supra* note 3, at 202-05, 265-66.

⁹⁵ ROSANVALLON, *supra* note 1, at 271. This suggests the tactics that can be deployed by opposition populists to undermine the articulated structure of constitutional governance.

⁹⁶ *Id.* See ROSANVALLON, *supra* note 3, at 201-02.

formation of policies is being virtually obliterated.⁹⁷ Unformed public opinions thus fall far short of serving as the safety valve of electoral democracy but become an end in itself. As a result, civic vigilance degenerates into the habitual derision of politics;⁹⁸ the defensive veto points as the antidote of “critical sovereignty” to the government result in the perpetuation of political gridlocks;⁹⁹ democratic judgment is turned into a politics of accusation instead of deliberative judgment through adversarial processes.¹⁰⁰ Worse yet, the unending, rapid, mass flow of unformed opinions can easily flood the available sources of information with fake news, overpowering conventional media’s function of filtering out misinformation and disinformation.¹⁰¹

From the pathology of “counter-democracy” as discussed above, we can infer reversely that in its healthy state, the structural articulation of the formal powers and the people’s unformed public opinions works on a more deliberative political tempo. In other words, for the government, being responsive is good but hyper-responsiveness without reflection would be a godsend to new populists, lending a helping hand to unmediated politics inadvertently.¹⁰² Corresponding to the articulation of the multiple stages of decisionmaking within the formal constitutional powers, the second structural articulation also works on the assumption that a certain period of time exists between the institutionalized exercise of political power and the

⁹⁷ See generally J.M. Balkin, *How Mass Media Simulate Political Transparency*, 3 J. CULTURAL VALUES 393 (1999).

⁹⁸ See ROSANVALLON, *supra* note 1, at 268-70.

⁹⁹ See *id.* at 270-71.

¹⁰⁰ See *id.* at 271-73. The tendency towards the criminalization of political responsibility can be seen as another sign of this development. See ROSANVALLON, *supra* note 3, at 180-81.

¹⁰¹ See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211 (2017).

¹⁰² But cf. SCHEUERMAN, *supra* note 9, at 202-17.

unformed intervention from the people. Taken together, the double structural articulation of constitutional governance as discussed above works on an assumed stepwise and deliberative political tempo.

If both the first and second structural articulation assume the same stepwise and deliberative political tempo, the disruption the emerging instantaneous decisionmaking style causes to the second structural articulation is likely to bear on the first. It is true that the multistage process of constitutional governance remains unchanged in form. We are still able to trace the steps a political idea takes towards its translation into reality through the multistage process. Yet the radicalization of the people's unformed public opinions also threatens to render the process of constitutional governance being multistage in name only.

As noted above, the people's intervention in the multistage process of constitutional governance through unformed public opinions has found itself "imprisoned in the immediate" so much so that the institutional decision and the public reaction seem to be synchronized. That not only affects the structural articulation between the formal constitutional powers and the people's unformed public opinions. Facing the same radicalized and incessant citizen surveillance and critical judgment, the distinctive stages in the process of constitutional decisionmaking are at the risk of merging into a single, mixed stage, so to speak.¹⁰³ Moreover, in the instantaneous style of democratic governance, the formal powers are not always in thrall to the people.¹⁰⁴ Rather, the people's unformed public opinions can be instrumental for the institutional players of distinctive stages to free themselves of the

¹⁰³ Cf. ROSANVALLON, *supra* note 23, at 221-24.

¹⁰⁴ See Balkin, *supra* note 97.

institutional constraints inherent in the multistage decisionmaking process. By going directly to the people, for example, the government can bring external pressure to bear on the legislature and other institutional players to push through its preferred policy or to obstruct the deliberative processes. The Trumpian presidency shows how the administration-legislature interaction can be twisted by the Commander-in-Chief's flowing Twitter tweets.¹⁰⁵ In a nutshell, the separation of powers is struggling in the instantaneousness of the new political landscape.

I hasten to add that the blurring of the distinction between individual stages of the exercise of power is not the only result of the emptying of separation of powers under instantaneous democracy.¹⁰⁶ Driven by such an instantaneous temporality, individual stages of the multistage process of constitutional decisionmaking are seemingly converted into the real-world stages on which politics is being hyper-dramatized.¹⁰⁷ Yet what is resulting from those political dramas is far from an Arendtian republic of theatricality-guided political actions.¹⁰⁸ Instead, the exercise of political power is virtually turned into an endless careless reality show, only to find itself in the same unpolitical/ antipolitical genre as the mutated, radicalized unformed public opinions.¹⁰⁹ Moreover, the expected "settle in" effect as a function of the

¹⁰⁵ E.g., Alex Shephard, *The GOP Needs Trump's Tweets*, NEW REPUBLIC, July 6, 2017, <https://newrepublic.com/article/143727/gop-needs-trumps-tweets>.

¹⁰⁶ See SCHEUERMAN, *supra* note 9, at 44-68, 80-97, 117-43.

¹⁰⁷ See also Balkin, *supra* note 97.

¹⁰⁸ See DANA R. VILLA, *POLITICS, PHILOSOPHY, TERROR: ESSAYS ON THE THOUGHT OF HANNAH ARENDT* 128-54 (1999).

¹⁰⁹ Brexit and the Trumpian presidency are good examples of the "unpolitical," if not antipolitical, character of dramatized politics. For a report on the "game" mentality of some prominent "Leave" leaders in their campaign for Brexit, see Nick Cohen, *There Are Liars and Then There's Boris Johnson and Michael Gove*, THE GUARDIAN, June 25, 2016, <https://www.theguardian.com/commentisfree/2016/jun/25/boris-johnson-michael-gove-eu-liars>. As regards the Trumpian presidency, the inclusion of the president's family members in the White House staff and the seemingly unending replacement of presidential advisers and other officials bears a bizarre resemblance to "The Apprentice" series hosted by the then showman Trump. Cf. Courtney Weaver, *Drama Is Struggling to Match the Reality of Donald Trump*, FINANCIAL TIMES, July 31, 2017, <https://www.ft.com/content/34120632-75d7-11e7-90c0-90a9d1bc9691>.

designed multistage process of constitutional decisionmaking is also fading away because of the compressed and accelerated decisionmaking style in the new political landscape, throwing the values of liberty, dignity, and respect at the core of the rule of law into doubt.¹¹⁰

In sum, the double structural articulation at the core of the functioning of constitutional governance is being eroded by the rising tide of instantaneous democracy. Under the pressure to respond to the hyperactive unformed public opinions, not only are the multiple stages of constitutional decisionmaking receding into the background but the formal powers are also becoming increasingly indistinct from the people's unformed opinions.¹¹¹ As a result, the exercise of political power is unleashed from the multistage process of constitutional governance, while the balance between the formal powers and the people's unformed public opinions is disrupted. As instantaneousness continues to displace representation and deliberation in constitutional democracy, the unmaking of articulated governance is afoot.¹¹² This is the fundamental impact new populism is exerting on constitutional democracy.

4. DECELERATION, DEMOCRATIC LEARNING, AND THE RE-ARTICULATION OF POLITICAL POWER

While democracy becomes increasingly instantaneous because of the structural transformation of social acceleration,¹¹³ the technology-induced instantaneous democracy as discussed above allows new populists to blur the formal powers and the people's unformed opinions in the first place and thereby disrupt the multistage formal decisionmaking process.

¹¹⁰ See WALDRON, *supra* note 57, at 63-64.

¹¹¹ See Balkin, *supra* note 97.

¹¹² See also ROSANVALLON, *supra* note 23, at 214-15.

¹¹³ See SCHEUERMAN, *supra* note 9, at 15-23, 44-68.

With the double structure of articulation dismantled, policy claims from new populists can go unchecked easily. Through this lens, politicians' provocative language and blustering rhetoric appear to be the direct challenge from new populism. Mindful of the populists' occasional unsubstantiated, fear-/hatred-arousing statements, discussion of the current wave of populism thus tends to focus on how to dispel popular ignorance with correct information.¹¹⁴ After all, the "marketplace of ideas" rationale has a long history in justifying freedom of speech as the pathway towards truth.¹¹⁵ More important, democracy has been regarded as a reflexive process of governance with the function of political learning.¹¹⁶ Through the democratic processes, unknown social issues can be detected and policy errors can be learned and corrected to address social needs. From this perspective of epistemic democracy and cognitive constitutionalism,¹¹⁷ the falsehoods created by new populists will eventually dissipate, despite the drive for instantaneousness. Thus, what requires in response to new populism is not only to carry out fundamental reforms but also to make them intelligible.¹¹⁸ Democratic learning appears to be the right answer to new populism.

Given that new populism is a function of the technology-induced instantaneous democracy, however, the answer of democratic learning is incomplete. The challenges posed by new populism and instantaneous democracy do not result from the lack of information or

¹¹⁴ See MÜLLER, *supra* note 1, at 3-5, 23-24; ROSANVALLON, *supra* note 1, at 307-10.

¹¹⁵ E.g., Eugene Volokh, *In Defense of the Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011).

¹¹⁶ See generally Kevin Olsen, *Reflexive Democracy as Popular Sovereignty*, in *NEW WAVES IN POLITICAL PHILOSOPHY* 125 (Boudewijn de Bruin & Christopher F. Zurn eds., 2009).

¹¹⁷ See PREUSS, *supra* note 53, at 125-26; FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 54-60 (1999); Stephen Holmes, *Constitutions and Constitutionalism*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 189, 202-04 (Michel Rosenfeld & András Sajó eds., 2012).

¹¹⁸ ROSANVALLON, *supra* note 1, at 307-08.

the people's loss of the desire for knowledge. The question is how the learning function of constitutional democracy can continue to work in the face of the relentless pursuit for instantaneousness.¹¹⁹ As discussed above, the fundamental challenge from new populism is its unmaking the structure of articulated politics in constitutional democracy as it rides the wave of instantaneous democracy to displace the deliberative political tempo. That suggests that the multistage process of constitutional governance and its embedded function of democratic learning operate on a particular political temporality.¹²⁰ If so, we need to consider how to restore the disrupted political temporality of constitutional governance so that the learning function of constitutional democracy can be revitalized to dispel the popular ignorance under the spell of new populism.¹²¹ "Deceleration" suggests the direction we can think further in conceiving of possible legal responses.

As suggested above, one of the consequences of the erosion of the multistage process of constitutional governance is that a populist head of government can render the deliberative function of the legislative body ineffective by appealing directly to the people's unformed opinions. The populist pressure increases more when the populist head-initiated policy proceeds to the implementation stage.¹²² Will the same trick work with respect to the court when disputes arise and come before it? The answer lies in the judicial proceedings, which

¹¹⁹ This evokes the issues Tim Wu attributes to the scarcity of the attention of listeners in the age of social media. See Tim Wu, *Is the First Amendment Obsolete?* 2 (The Knight First Amendment Institute at Columbia University, Emerging Threats Series, 2017), <https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf>.

¹²⁰ Compare SCHEUERMAN, *supra* note 9, at 26-70, with ROSANVALLON, *supra* note 23, at 128-29, 142-45.

¹²¹ See also ROSANVALLON, *supra* note 23, at 144-45.

¹²² See, e.g., Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism: The Case of Fujimori's Peru*, in *POPULISM IN EUROPE AND THE AMERICAS: THREAT OR CORRECTIVE FOR DEMOCRACY?* 160, 172 (Cas Mudd & Cristóbal Rovira Kaltwasser eds., 2012).

have been noted for their slow pace and invited criticism for that reason.¹²³ Counter-intuitively, that inbuilt institutional deficiency of the judicial proceedings can be a structural asset of the multistage process of constitutional governance in its pushback against new populism.

In contrast to the political branches, the court is not designed as a responsive institution vis-à-vis public opinions. This by no means suggests that the court is not expected to listen to the people but it does mean that the court does not carry out its function in a purely responsive way.¹²⁴ Moreover, unless in the extreme case of an immediate judicial purge following the inauguration of the elected populist government and parliament, unelected and tenured judges, as an institution, are less vulnerable to the tides of populist vitriol than those holding political office.¹²⁵ My point is that the default slow-paced judicial decisionmaking puts the court in a special institutional position to face the populist push. The slowness of the court decision in and of itself is an asset to combat new populism, despite the historical record that the court also bowed to populist pressure when push came to shove.¹²⁶ With the judicial proceedings unfolding stepwise, it allows the populist idea-turned legal norms to “settle in.”

¹²³ See SCHEUERMAN, *supra* note 9, at 42-44. See also Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 517-18 (2018).

¹²⁴ Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 73, 74-76 (Irwin P. Stotzky ed., 1993).

¹²⁵ See John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 356-65 (1999). To be sure, if we take into account elected judges as adopted in many states in the US, the issue will become more complex and the idea of judicial deceleration is likely to be neutered. See Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES, Oct. 4, 2016, at A12. Also, this does not tell us whether the court itself is populist in the sense that it decides cases in correspondence with public opinion. See generally Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013).

¹²⁶ See BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 60-64 (2006); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1143-44 (2009).

This is critical.

Specifically, as has been discussed, the temporal gap and distinction between individual stages in the multistage decisionmaking process precondition the people's reflective internalization of legal precepts. Thus, the effect of the new policy enacted in the law does not transpire until the law settles in. Furthermore, only when the effect of the new policy fully transpires can the people reflect thoroughly on the legal precept concerned. Along these lines, the people and the politicians can get a better sense of the real-world implications of the populist-driven policy and reconsider their attitude towards it accordingly when its unfolding effect is continuously reflected upon with the progress of the judicial proceedings. In other words, judicial deceleration can help to restore the rushed process of democratic learning.

It is true that the court may still uphold the disputed law in the end of the case. Nevertheless, its slow pace can buy the democratic society time to reflect and reconsider.¹²⁷ To put it bluntly, learning takes time even for quick learners. Apart from its potential role in regenerating democratic learning, deceleration by judicial intervention has further implications to the idea of articulated governance in constitutional democracy. Taking advantage of judicial deceleration, opposition forces can mobilize and regroup themselves, (re)opening frontiers for new political contests. The contested policy may well reenter the legislature for a new debate or further investigation, suggesting a re-articulation of political power. With its impact on the subsequent parliamentary debate, the post-referendum judicial intervention in

¹²⁷ Algorithm might be a game changer in this regard. Yet, as far as democracy is concerned, algorithm raises more questions than answers. *See generally* CATHY O'NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* (2016).

the Brexit Question in the UK shows how the court could make a difference in the face of populist forces.¹²⁸

The pending travel ban case in the US provides another example of how judicial deceleration can contribute to the fight against new populism. Though the Supreme Court later ordered to stay the preliminary injunctions issued by two federal district courts with respect to the Trump Administration's most recent travel ban,¹²⁹ the early judicial intervention had helped to expose the problems with the original order to public scrutiny. Despite the likelihood that the Supreme Court may eventually endorse the administration's revised position,¹³⁰ the litigation itself has allowed the wide range of ramifications of the controversial policy to be fully appreciated, leading to the eventual replacement of the flawed original order with the most recent revised proclamation. Granted, the impugned executive order in the pending case still contains constitutionally suspicious contents.¹³¹ Nevertheless, the fact that it results from the White House's reaction to a series of judicial injunctions on its early versions suggests how judicial deceleration can help to put brakes on the populist push.¹³² The interaction among the administration, the people, and the injunction court can be a back-door (partial) substitution for the weakened deliberative function, opening up new possibilities for

¹²⁸ R (Miller) v. Secretary of State for Exiting the European Union, [2017] UKSC 5. See also Issacharoff, *supra* note 123, at 518.

¹²⁹ Adam Liptak, *Supreme Court Allows Trump Travel Ban to Take Effect*, N.Y. TIMES, Dec. 5, 2017, at A1.

¹³⁰ Adam Liptak & Michael D. Shear, *Key Justices Seem Skeptical of Challenge to Trump's Travel Ban*, N.Y. TIMES, Apr. 26, 2018, at A1. As of May 9, 2018, the Supreme Court has not yet made its decision.

¹³¹ Editorial, *Whatever Courts Say, Trump's New Travel Ban Is Still Bad Policy*, WASH. POST, Oct. 16, 2017, https://www.washingtonpost.com/opinions/whatever-courts-say-trumps-new-travel-ban-is-still-bad-policy/2017/10/16/af403940-af8f-11e7-9e58-e6288544af98_story.html?utm_term=.9465075a439d.

¹³² See Issacharoff, *supra* note 123, at 519.

articulated governance under the pressure of new populism.¹³³

Neither of the above two examples suggests that we can rest assured that constitutional democracy will be fine as the multistage process of constitutional governance has built in judicial deceleration for self-preservation.¹³⁴ Rather, as the travel ban case suggests, the court must intervene in time instead of waiting for the case to become ripe. To play the role of the institutional decelerator effectively, the court will have to rebalance its core judicial function of judging cases on substance and the less noticed one of issuing early injunctions. Further along these lines, equity will become increasingly important in the judicial function alongside the court's traditional focus on issues concerning legality.¹³⁵ True, both equity and legality have long been the jurisdiction of the court.¹³⁶ Yet, given the high degree of uncertainty and conflicting interests at stake in equitable remedies,¹³⁷ ordering injunctions may well implicate the court in more politically charged issues, intensifying the politicization of the judicial branch.¹³⁸ This concern is fair and should not be taken lightly.

Yet it should be noted that by the exercise of its injunction power or its classical function of deciding the legality or constitutionality of a controversial populist measure, the court is not

¹³³ As each decisionmaking stage has its intended function and the sequencing of the component stages in the multistage process of constitutional governance is deliberately arranged, the effect of the back-door substitution requires further examination. WALDRON, *supra* note 57, at 70-71.

¹³⁴ Sam Issacharoff notes the limits of judicial deceleration in Hungary and Poland. Issacharoff, *supra* note 123, at 518-19.

¹³⁵ Cf. KIRSTEN STOLL-DEBELL ET AL., INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 125-47 (2009). Failing to notice this distinction, Scheuerman does not pin much hope on judicial deceleration in that judicial lawmaking, which centers on legality, is likely to succumb to social acceleration as with the enactment of statutes. Scheuerman, *supra* note 9, at 136-43.

¹³⁶ ROBERT S. THOMPSON ET AL., REMEDIES: DAMAGES, EQUITY, AND RESTITUTION 208-09 (4th ed. 2009).

¹³⁷ *Id.* at 336.

¹³⁸ Cf. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 143-56 (1962).

called upon to substitute its decision for that made through the political process. What the court is expected to do under the guidance of judicial deceleration is not to set aside the contested policy or law but rather to make room for the learning function of constitutional democracy to play out and the re-articulation of politics by putting brakes on the populist feeling-driven decision. More important, the new constitutional context that calls for institutional deceleration works against the conventional wisdom that guided by the virtue of prudence, the court had better not intervene in the early stage of the dispute to allow the political process to run its course.¹³⁹ For one thing, without the court's injunctive intervention, the disputed law that was rushed through the legislative process will come into force, compelling the people to comply and thus suffer. For another, the intensifying effect of the court's intervention through early injunctions should be welcomed as it can be the catalyst for a new political dynamic vis-à-vis populist movements.¹⁴⁰ Judicial deceleration is neither a panacea for populist movements nor a proposal for heroic courts but a plea for the judicial aid in fighting new populism with democratic learning.¹⁴¹

5. CONCLUSION

Populist movements around the globe in the twenty-first century are a complex political phenomenon that defies a common definition. Their goals are diverse and causes are locally determined. It is also unclear whether all of them are new and to what extent they stand apart from the past waves of populism in modern history. For these reasons, *new* populism is hard

¹³⁹ *Id.*

¹⁴⁰ See also Issacharoff, *supra* note 123, at 518-19.

¹⁴¹ Rosanvallon characterizes such an exercise of judicial review as an instance of "reflexive democracy." ROSANVALLON, *supra* note 23, at 137-47.

to pin down and how to respond to it is also unclear as the way it challenges constitutional democracy remains elusive.

The political project of constitutional and democratic governance is a complex form in which “man’s quest for freedom, emancipation, and autonomy” has been kept alive.¹⁴² Through my lens, only some of the diverse populist movements subsumed under the rubric of new populism appear to be genuinely new to the extent that their political leaders relentlessly resort to social media and other instantaneous communications technologies to embrace an unmediated politics at the expense of democratic representation and deliberation. This does not tell us whether this new form of populism is more or less dangerous than its more conventional counterparts. Yet it does suggest that it require a more focused prognosis than a general response to populism. Benefiting from the technology-induced instantaneous democracy, new populism presents an alternative politics that envisages the displacement of constitutional complexity with anti-institutional simplicity. In this way, new populism shakes up the double structure of articulation in the project of constitutional governance and blunts the learning function of constitutional democracy, jeopardizing the continuing quest for political freedom, emancipation, and autonomy in human history. It is against that backdrop that I have argued that new populism is the pathology of instantaneous democracy.

In conceiving responsive strategies to mitigate the destructive effect of the instantaneous decisionmaking style that bolsters new populists, I have argued that regenerating the learning function of democracy is critical in combating the disease of new populism. Without

¹⁴² *Id.* at 224-25.

unplugging social acceleration,¹⁴³ deceleration suggests the direction we can think further in responding to new populism. As part of the possible cure for the pathology of instantaneous democracy, judicial deceleration shows how constitutional governance can give itself a chance in the face of the relentless politics of instantaneousness and simultaneity. Granted, social media are only one of the means for new populists to suit their ends and are not necessarily antagonistic to democracy.¹⁴⁴ Also, to fully address the challenges posed by the technology-induced instantaneous democracy requires a comprehensive strategy, including the restoration of “a vision of a common world” and the defragmentation of public opinions.¹⁴⁵ The law’s overall role in that comprehensive strategy remains to be seen.¹⁴⁶ Even so, democratic learning, aided by tactics of judicial deceleration before we figure out that grand strategy, at least gives us some hope to save the project of political freedom and constitutional governance in the great battle against new populism.

¹⁴³ Cf. SCHEUERMAN, *supra* note 9, at 58-60, 192-95.

¹⁴⁴ How Recep Erdogan and the Turkish military coup leaders fought for the control of information in the 2016 failed coup d’état shows that new communications technologies can be an aid to democracy. The military coup leaders followed the old playbook of coups d’état and seized the control of the state-run TV station in the first place, whereas Erdogan outmaneuvered the coup plotters’ attempt to control the official propaganda through a variety of social media, including a FaceTime video with his iPhone. Sam Schechner, *Erdogan Embraces Social Media to Repel Coup Attempt in U-Turn*, WALL ST. J., July 17, 2016.

¹⁴⁵ ROSANVALLON, *supra* note 1, at 306; SUNSTEIN, *supra* note 38, at 213-33.

¹⁴⁶ SUNSTEIN, *supra* note 38, at 231, 233.